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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1944**

**No. 23**

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E. JACK SMITH, JACK CLARK, R. L. RIVERS, AND  
W. CORRY SMITH, PARTNERS TRADING UNDER  
THE FIRM NAME OF E. JACK SMITH, CONTRAC-  
TOR, PETITIONERS,

*vs.*

COMER DAVIS, REESE PERRY AND JOHN C.  
TOWNLEY, AS BOARD OF COUNTY TAX ASSE-  
SORS OF FULTON COUNTY, ET AL.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF GEORGIA

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**PETITION FOR CERTIORARI FILED FEBRUARY 8, 1944.**

**CERTIORARI GRANTED APRIL 3, 1944.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 680

E. JACK SMITH, JACK CLARK, R. L. RIVERS AND  
W. CORRY SMITH, PARTNERS TRADING UNDER  
THE FIRM NAME OF E. JACK SMITH, CONTRAC-  
TOR, PETITIONERS,

vs.

COMER DAVIS, REESE PERRY AND JOHN C.  
TOWNLEY, AS BOARD OF COUNTY TAX AS-  
SESSORS OF FULTON COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF GEORGIA

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JUDG & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1944.

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[fol. 1]

**IN THE SUPERIOR COURT OF FULTON COUNTY,  
GEORGIA**

E. JACK SMITH, Contractor,

vs.

COMER DAVIS ET AL., as Members of the Board of County Tax  
Assessors of Fulton County, Georgia, et al.

BILL OF EXCEPTIONS—Filed June 2, 1943

To the Supreme Court of the State of Georgia:

Be it remembered that on May 14, 1943, during the May term, 1943, of the superior court of Fulton County, Georgia, there came on regularly to be heard before the Honorable Walter C. Hendrix, judge of said superior court then and there presiding, the demurrers filed on January 15, 1943; and on March 29, 1943, and on May 14, 1943, by Comer Davis, Reese Perry and John C. Townley, in their capacity as members of the Board of County Tax Assessors of Fulton County, Georgia, Guy Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, which tax officials are the defendants in the above entitled case.

Said action was an equitable proceeding instituted by E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers, as plaintiff in which equitable proceeding said E. Jack Smith, contractor, sought to enjoin the defendant tax officials from making any assessment against E. Jack Smith, contractor, by reason of its ownership of accounts receivable and of certificates of indebtedness described in the petition, for the calendar year 1942, and sought further to enjoin the defendant tax officials from entering said assessments or from issuing executions based thereon or from doing anything to force E. Jack Smith, contractor, to pay taxes on such accounts receivable and certificates of indebtedness.

Said E. Jack Smith, contractor, filed an amendment to [fol. 2] its said petition on March 29, 1943, and on the same day said defendants renewed their original demurrer to plaintiff's petition as so amended and filed a second de-

murrer on March 29, 1943, by which defendants renewed all of the general grounds of the original demurrer so filed by defendants, and in addition thereto demurred to the petition as so amended upon four new grounds added by said demurrer filed March 29, 1943, designated respectively as the 10th, 11th, 12th, and 13th grounds of the demurrer.

Thereafter on April 20, 1943, the plaintiff filed a second amendment to its petition as previously amended and the defendants on May 11, 1943, after the filing of plaintiff's second amendment, renewed their previous demurrers so filed on January 15, 1943, and on March 29, 1943, which demurrers were renewed and urged by defendants to plaintiff's petition as finally amended.

After consideration and argument of counsel said court, the Honorable Walter C. Hendrix, judge of said court then and there presiding, entered a judgment and order overruling all demurrers so filed by the defendants, namely, the demurrer filed January 15, 1943; the demurrer filed March 29, 1943, and the demurrer filed May 11, 1943, which demurrers were overruled by the court upon each and every ground thereof.

Said order dated May 14, 1943, overruling said demurrers was adverse to and against the contentions of the defendants, to which order the defendants then and there excepted and here and now except and assign the same as error:

Defendants Comer Davis, Reese Perry, and John C. Townley in their capacity as members of the board of tax assessors of Fulton County, Georgia, Guy A. Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, accordingly tender this bill of exceptions on this 1st day of June, 1943, within the time prescribed by law, naming themselves as plaintiffs in error and naming as defendant in error, E. Jack Smith, contractor, a partner [fol. 3] ship composed of E. Jack Smith, John Clark, W. Gorry Smith, and R. L. Rivers, and also E. Jack Smith, Jack Clark, W. Gorry Smith and R. L. Rivers, the individual members of said partnership, and assign said order dated May 14, 1943, as error, on the ground that said judgment overruling said demurrers was and is contrary to law and on the ground that the court erred in overruling each ground contained in the demurrer filed January 15, 1943, and the demurrer filed March 29, 1943, and in overruling the demurrer filed May 11, 1943.

Plaintiffs in error specified as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. Plaintiffs' petition filed November 24, 1942.
2. Defendants' original demurrer filed January 15, 1943.
3. Plaintiff's first amendment filed March 29, 1943, together with exhibits thereto attached.
4. Defendants' second demurrer filed March 29, 1943.
5. Plaintiff's second amendment filed April 20, 1943.
6. Defendants' renewal of their demurrers filed May 11, 1943.
7. Final order on demurrers dated May 14, 1943.

Plaintiffs in error respectfully pray that this bill of exceptions be signed and certified and transmitted to the Supreme Court of the State of Georgia in order that the errors alleged to have been committed may be considered and corrected.

Plaintiffs in error aver that the Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction because of the fact that the proceeding is an equitable proceeding and because the exception is to an order overruling a general demurrer in an equitable cause.

[fol. 4] This June 1st, 1943.

E. H. Sheats, Standish Thompson, W. S. Northcutt, Attorneys at law for Comer Davis, Reese Perry and John C. Townley in their capacity as members of the board of county tax assessors of Fulton County, Georgia, Guy Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, as plaintiffs in error.

Address: 1403 C. & S. Nat. Bank Bldg., Atlanta, Georgia.

IN SUPERIOR COURT OF FULTON COUNTY

ORDER APPROVING BILL OF EXCEPTIONS—June 1, 1943

I do certify that the foregoing bill of exceptions is true and contains all the evidence and specifies all of the record, material to a clear understanding of the errors complained

of; and the clerk of the superior court of Fulton County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

Walter C. Hendrix, Judge Superior Court, Atlanta Circuit.

June 1st, 1943.

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Due and legal service of the foregoing bill of exceptions acknowledged; copy received. All other and further service and notice waived.

[fol. 5] Morgan Belser, Attorney at law for E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers; also attorney at law for E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, the individual members of said partnership.

June 1st, 1943.

[File endorsement omitted.]

[fol. 6] IN SUPERIOR COURT OF FULTON COUNTY

CLERK'S CERTIFICATION TO BILL OF EXCEPTIONS—JUNE 8, 1943

GEORGIA,

Fulton County:

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit:

Comer Davis et al., as members of the board of county tax assessors of Fulton County, Georgia, plaintiff in error vs. E. Jack Smith et al., defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 8th day of June, 1943.

Cora M. Kennedy, Deputy Clerk Superior Court  
Fulton County, Georgia. Ex Officio clerk City  
Court of Atlanta. (Seal.)

[File endorsement omitted.]

[fol. 7] IN SUPERIOR COURT OF FULTON COUNTY

PETITION

GEORGIA,

Fulton County:

To the Superior Court of said County:

The petition of E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, respectfully shows the following:

1

That the defendants named herein are Comer Davis, Reese Perry, and John C. Townley, as the board of county tax assessors of Fulton County, Georgia; Guy Moore, as tax receiver of Fulton County, Georgia, and T. E. Suttles, as tax collector of Fulton County, Georgia.

2

Each of said defendants is a resident of Fulton County, Georgia.

3

Petitioner is a partnership composed of the individuals hereinabove set forth, having its principal office in Fulton County, Georgia.

4

Petitioner is now and at all times herein mentioned, has been in the contracting and construction business and in this connection furnished paving materials to and performed certain work in constructing public highways and United States Army Air Bases for the State of Georgia, various counties of Georgia and the United States Government.

5

On January 1, 1942, petitioner held and owned the following accounts due it by the County of Camden, Georgia, the State of Georgia, and the United States Government:

Camden County, Georgia	\$ 1,102.14
State of Georgia	15,086.84
United States Government	29,831.10

[fol. 8]

In addition to the accounts set forth above, petitioner also at said time held and owned various certificates of indebtedness in the amount of \$117,950.68 issued to it by the Highway Department of the State of Georgia.

Petitioner shows that the indebtedness owing to it by Camden County, Georgia, as hereinabove set forth, represented an open account due for furnishing paving materials and laying the same on a public highway in said county, which work had been commenced and completed within the year 1941, and performed under contract with Camden County.

Petitioner shows that the indebtedness owing to it by the State of Georgia, as hereinabove set forth, represented an open account due for grading, draining, paving, furnishing of paving materials, and constructing certain public highways in Liberty and Camden Counties, Georgia, which work was commenced and completed within the year 1941, and performed under contract with the State of Georgia.

Petitioner shows that the indebtedness owing to it by the United States Government, as hereinabove set forth, represented an open account due for furnishing paving materials, grading, draining and laying of paving materials in the construction of United States Army airports at Savannah, Georgia, which work was performed under contract with the United States Government, the amount of said indebtedness representing the amount due petitioner by the United States Government on January 1, 1942.

Petitioner shows that the certificates of indebtedness hereinabove referred to evidenced an indebtedness in said amount due to petitioner by the State of Georgia for work [fol. 9] done and performed by petitioner under contract with the said State of Georgia in furnishing paving materials to the State of Georgia, through the State Highway

Department of Georgia for use in constructing various public highways in the State of Georgia.

11

By reason of the various facts with respect to the nature of the indebtedness represented by said open accounts receivable and certificates of indebtedness, petitioner alleges that the same are not taxable in Fulton County or in the State of Georgia.

12

Notwithstanding the facts above alleged, the defendants constituting the board of county tax assessors of Fulton County, Georgia, have notified petitioner that unless it returns said accounts receivable and certificates of indebtedness for taxation, the defendants will assess said property and cause said assessment to be entered on the tax digest, and said defendants are threatening to assess such accounts receivable and certificates of indebtedness for ad valorem taxes for the State of Georgia and County of Fulton and to cause all such assessments to be entered on the tax digest of Fulton County, Georgia, for the year 1942, and to cause an execution to issue for such taxes, and said defendants are at present preparing such assessments and will, unless restrained and enjoined from so doing, make such assessments and have the same entered on the tax digest on November 24, 1942, and cause said execution when issued to be levied on the property of petitioner.

13

The defendant, Guy Moore, as tax receiver of Fulton County, Georgia, has notified petitioner that he will enter said tax assessment on the tax digest and is threatening [fol. 10] to enter upon the tax digest the assessment sought to be made by the defendants constituting the board of county tax assessors of Fulton County, Georgia, and at the present time is preparing to enter said assessment upon the tax digest and will do so unless restrained and enjoined therefrom.

14

Petitioner alleges that said accounts receivable and certificates of indebtedness are not subject to taxation by

Fulton County, Georgia, or by the State of Georgia, and that the threatened assessment thereon for taxation and the threatened taxation thereof would be without lawful authority and would be contrary to the constitutional rights of petitioner and would be in violation of the provisions of the Constitution of the State of Georgia because said threatened taxation, if carried out, would deprive petitioner of its property without due process of law, contrary to the provision of the constitution of the State of Georgia contained in article I, section 1, paragraph 3, as follows: "No person shall be deprived of life, liberty, or property except by due process of law."

15

Petitioner further alleges that the threatened taxation of said accounts receivable and certificates of indebtedness, if carried out, would deprive petitioner of its property without due process of law contrary to the provisions of the constitution of the United States; contained in the fourteenth amendment as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

16

Petitioner alleges that the threatened taxation of said accounts receivable and certificates of indebtedness would [fol. 11] be violative of the constitutional provisions of the State of Georgia and of the United States Government as hereinabove set forth for the reason that said accounts receivable and certificates of indebtedness are instrumentalities of the United States of America, the State of Georgia, and a governmental subdivision thereof and as such are not taxable property subject to taxation by the County of Fulton or the State of Georgia.

17

Petitioner alleges that it would suffer irreparable damage if the said defendants are permitted to carry out their threats and make assessments against petitioner and have the same entered on the tax digest or to cause executions to be issued against petitioner. Such action, if carried out, would cast a cloud upon the title of all property owned

by petitioner in Fulton County or the State of Georgia, and petitioner alleges that it owns valuable personal property located in said State and County.

18

Petitioner alleges that such action would seriously affect the salability of said property and would cause great inconvenience, annoyance and expense to petitioner because petitioner's said property at present is actually being used by petitioner in constructing runways and other pavement on United States army airports under contract with the United States Government, and because for other reasons there is no provision of law in Georgia by which taxes can be paid under protest and then recovered, and there is no provision of law in such cases where assessments are made by the board of county tax assessors for taxpayers to contest the taxability of the property so assessed and under the laws of Georgia an affidavit of illegality does not lie against the enforcement of a tax lien for State and County taxes.

[fol. 12] 19

Petitioner alleges that if the defendants are not restrained and enjoined, they will proceed to make the assessments as threatened, the tax receiver will enter the same on the tax digest and the tax collector will issue execution and cause the same to be levied on the property of this petitioner.

20

Petitioner has no full, complete, and adequate remedy at law and will suffer irreparable damage unless the defendants are restrained and enjoined as herein prayed.

Wherefore, waiving discovery, petitioner prays:

1. That process issue requiring the said defendants and each of them to be and appear at the next term of this court to answer petitioner's complaints.
2. That a rule nisi be granted requiring the said defendants to show cause before the non-jury division of this court why they should not be enjoined from making any assessment against petitioner on the accounts receivable and certificates of indebtedness referred to in said petition and why the defendants, the tax receiver and the tax collector, should

not be enjoined from entering said assessments against petitioner and from issuing execution based on such assessments, and from doing anything to force petitioner to pay taxes on such accounts receivable and certificates of indebtedness as are set forth in the petition and which the defendants are threatening to assess and attempt to collect taxes on as set out in said petition, and that upon an interlocutory hearing said defendants and each of them be enjoined in the respects above set out.

3. That, in the meantime and until interlocutory hearing can be had, the defendants and each of them be restrained from doing any of the things for which injunction is prayed in the preceding paragraph.

[fol. 13] 4. That petitioner be granted such other and further relief as may be necessary to protect petitioner and to which it may be entitled in the premises.

Morgan Belser, Attorney for Petitioner.

8

*Duly sworn to by R.L. Rivert. Jurat omitted in printing.*

[fol. 14] In Superior Court of Fulton County

TEMPORARY RESTRAINING ORDER—November 24, 1942

The within and foregoing petition has been read and considered. Let the same be filed. Let the defendants and each of them be served with a copy of the foregoing petition and of this order.

Let the defendants show cause before the judge presiding in the non-jury division of this court on the 27th day of November, 1942, at 10:00 o'clock a. m., why the prayers of the said petition should not be granted.

In the meantime and until further order of the court, the defendants and each of them are expressly restrained from doing any of the acts for which temporary injunction is prayed in the foregoing petition.

This 24th day of November, 1942.

Edgar E. Pomeroy, Judge S. C. A. C.

[fol. 15] In SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

SUMMONS AND RETURN

To the Sheriff or His Deputy, of said County, Greeting:

The defendants are hereby required, personally or by attorney, to be and appear at the superior court, to be held in and for said County, on the first Monday in January, 1943, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable John D. Humphries, Judge of said court, this 24th day of November, 1942.

D. W. Brown, Deputy Clerk.

Filed in office, this the 24 day of Nov. 1942.

D. W. Brown, Deputy Clerk.

Due and legal service of a copy of the foregoing petition and process and of the restraining order thereon is hereby acknowledged, and all other and further service is waived. This November 24, 1942.

Guy Moore, as tax receiver of Fulton County, Georgia; Guy A. Moore, tax recvr., by Jason A. Taggle, Chief Deputy; T. E. Suttles, as Tax Collector of Fulton County, Georgia, by T. E. Suttles.

Comer Davis, Reese Perry, and John C. Townley, as members of the board of tax assessors of Fulton County, Georgia. Comer Davis, by R. Perry, John C. Townley.

[fol. 16] In SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed January 15, 1943

Now come Comer Davis, Reese Perry and John C. Townley in their capacity as members of the board of tax asses-

sors of Fulton County, Georgia, Guy Moore in his official capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles, in his official capacity as tax collector of Fulton County, Georgia, defendants in the above case, and respectfully demur to plaintiff's petition and to portions herein specified, upon each of the following grounds:

1st

Because the petition sets forth no cause of action against the defendants, or either of them.

2nd

Because there is no equity in the bill.

3rd

Because the petition fails to disclose any reason why the accounts described in paragraph five of the petition, or either of them, are not subject to tax in Fulton County, Georgia.

4th

Defendants demur to the last clause of paragraph seven of the petition and to all portions relating to an alleged contract with Camden County, on the ground that no copy of the alleged contract is incorporated in the petition or attached as an exhibit thereto.

5th

Defendants demur to the last clause of paragraph eight [fol. 18] of plaintiff's petition and to all portions thereof relating to an alleged contract with the State of Georgia, on the ground that said alleged contract is not incorporated in the petition or attached thereto as an exhibit.

6th

Defendants demur to the last clause of paragraph nine of the petition beginning with the words "which work was" and continuing through the remainder thereof, and to all portions of the petition relating to an alleged contract with the United States Government, on the ground that no copy of said contract is incorporated in the petition or attached thereto as an exhibit.

7th

Defendants demur to that portion of paragraph ten of the petition referring to an alleged contract with the State of Georgia on the ground that no copy of said contract is incorporated in the petition or attached thereto as an exhibit.

8th

Defendants demur to the allegations of paragraph fourteen of the petition relating to the alleged unconstitutionality of the threatened assessment and the threatened taxation of petitioner's accounts on the ground that neither said paragraph nor the petition disclose any legal reason why such assessment and such taxation would deprive petitioner of its property without due process of law, and on the ground that the allegations of said paragraph seek only to invoke an alleged constitutional right by reference only to a clause of the constitution of Georgia without setting forth the reason or the basis of said attack or any facts which disclose lack of due process in the conduct of the defendants complained of.

9th

Defendants demur to the allegations of paragraph fifteen [fol. 19] of the petition relating to the alleged unconstitutionality of the threatened taxation of accounts receivable and certificates of indebtedness, on the ground that neither said paragraph nor the petition disclose any legal reason why such threatened taxation, if carried out, would deprive petitioner of its property without due process of law, or deprive petitioner of any right to which petitioner is entitled under the Fourteenth amendment to the constitution of the United States, and on the ground that the allegations of said paragraph seek only to invoke an alleged constitutional right by reference only to a clause of the constitution of the United States without setting forth the reason or the basis of said attack, or any facts which disclose lack of due process or equal or denial of equal protection on account of any act threatened by either of defendants to this suit.

Wherefore, defendants pray that this demurrer be sustained upon each and every ground thereof, that all portions of the petition herein specially demurred to be stricken and eliminated from the petition, that plaintiff's petition be dis-

missed, and that defendants have judgment for all costs in this behalf incurred.

E. H. Sheets, County Attorney; W. S. Northcutt,  
Assistant County Attorney; —————, Assistant  
County Attorney; Standish Thompson, Attorney  
at Law, Attorneys at Law for Defendants.

[File endorsement omitted.]

[fol. 20] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO PETITION—March 29, 1943

Comes now E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers, and by leave of the court first had and obtained, amends the petition heretofore filed in said case as follows:

1

Petitioner amends paragraph 6 of said petition by adding thereto the following to be known as paragraph 6 (a):

6(a). The said certificates of indebtedness were issued in accordance with the act of the General Assembly of Georgia approved February 26, 1941 (Ga. Laws 1941, page 596).

2

Petitioner amends paragraph 7 of said petition by adding thereto the following to be known as paragraph 7 (a):

7 (a). The said contract was not in writing but was an oral contract entered into on or about July 10, 1941, by and between petitioner and the board of commissioners of Camden County, Georgia, acting by and through its chairman, N. C. Brown, under the terms of which contract it was agreed by and between the parties that petitioner would construct a public highway in said county and in this connection, would furnish work, labor and materials as follows: (1) Prepare base by grading 2152 square yards at 31¢ per square yard; (2) 2152 square yards six-inch compacted sand bituminous stabilized road-bed at 11¢ per square yard;

and (3) 10,062 gallons of bituminous material (asphalt) at 9c a gallon, and for which work, labor and materials the said Camden County would pay petitioner the sum of [fol. 21] \$1,217.62, computed as aforesaid, less the sum of \$115.48, representing a credit on account of petitioner's use of said county's equipment. Although said work was done and said materials furnished prior to January 1, 1942, payment therefor was not made until after said date, and, accordingly the said items represented an open account receivable in the amount of \$1,102.14 due petitioner on January 1, 1942.

3

Petitioner amends paragraph 8 of said petition by adding thereto the following to be known as paragraph 8 (a):

8 (a). The work, labor and materials furnished by petitioner to the State of Georgia as herein alleged were furnished in accordance with the terms of a written contract executed October 8, 1941, by and between the State Highway Board of Georgia, and petitioner, a copy of which contract is attached hereto, marked Exhibit A, to which reference is prayed as often as may be necessary. On January 1, 1942, there was due petitioner by the State of Georgia a balance of \$15,086.84, for work, labor and materials furnished in pursuance of said contract and said amount represented an open account receivable due petitioner on said date.

4

Petitioner amends paragraph 9 of said petition by adding thereto the following to be known as paragraph 9 (a):

9 (a). The work, labor and materials furnished by petitioner to the United States Government were furnished for the purpose of and in connection with the construction of two airports or bases located at Savannah, Georgia, for the use of the United States Army. The said army airports were designated as the Savannah Municipal Airport No. 2, and the Savannah Air Base.

The work, labor and materials furnished by petitioner in connection with the construction of said Savannah Municipal Airport No. 2 were furnished in pursuance of the terms of a written contract executed by the United States of America and E. Jack Smith, contractor, dated

June 16, 1944, and approved June 30, 1941, a copy of which contract is attached hereto and marked exhibit B, to which reference is prayed as often as may be necessary.

The work, labor and materials furnished by petitioner in connection with the construction of the said Savannah Air Base were furnished in pursuance of the terms of a written contract executed by the United States of America and E. Jack Smith, contractor, dated June 24, 1941, and approved July 12, 1941, a copy of which contract is attached hereto, marked exhibit C, to which reference is prayed as often as may be necessary.

For the work, labor and materials furnished by petitioner to the United States of America in pursuance of the terms of said contracts, there was due petitioner by the United States of America on January 1, 1942, the sum of \$29,831.10, representing the balance due under the terms of said contracts. The balance aforesaid was in the nature of an open account and represented an account receivable in the hands of petitioner on said date.

5

Petitioner amends paragraph 10 of said petition by adding thereto the following to be known as paragraph 10 (a):

10 (a). The said Highway Department of Georgia contracted for such materials by inviting bids from contractors engaged in furnishing such materials and by awarding contracts to those making the lowest bid. The procedure for letting such contracts by bids was as follows: The supervisor of purchases of the State of Georgia, in accordance with the act of the General Assembly of Georgia, approved March 24, 1939, (Georgia Laws 1939, page 167), mailed to all [fol. 231] contractors, including petitioner, an invitation to submit bids for a specific quantity, grade and type of materials to be furnished in the construction of a highway designated by project number and county. In response to such invitations, said contractors, including petitioner, submitted bids on the work and materials specified in the invitations. Upon the opening of the bids, the State supervisor of purchases awarded the contract to the contractor submitting the lowest bid. Thereafter, as the work on the specified project progressed and from time to time thereafter as the materials were required for use on said project the supervisor of purchases of the State of Georgia issued

to such low bidder a purchase order or purchase orders requiring delivery of such materials. A typical example of the procedure followed in contracting with petitioner for the furnishing of paving materials represented by said certificates of indebtedness was as follows:

On June 25, 1940, the supervisor of purchases of the State of Georgia, in accordance with the act of the General Assembly of Georgia, approved March 24, 1939, mailed to petitioner a letter commonly known and referred to as an invitation to bid, which letter invited petitioner to bid an approximately 7,000 tons of hot plant sand asphalt seal to meet section 145 of the State Highway specifications and reciting that bids would be received until 11:00 o'clock a.m. central daylight saving time July 10, 1940, a copy of which letter or invitation is attached hereto, marked exhibit D, to which reference is prayed as often as may be necessary. In response to said invitation, petitioner, on July 10, 1940, submitted his bid on the form prescribed by the said act of the General Assembly approved March 24, 1939, wherein he offered to furnish said materials upon the terms specified, at \$4.45 per ton, a copy of which bid is attached hereto, marked exhibit E; to which reference is prayed as often as may be necessary. Thereafter on July 15, 1940, the supervisor [fol. 24] of purchases of the State of Georgia issued to petitioner the State's purchase order No. 9511, requiring delivery of a portion of the material referred to in said invitation and bid, a copy of which purchase order is attached marked exhibit F, to which reference is prayed as often as may be necessary.

All of the transactions by and between petitioner and the State Highway Board of Georgia relating to the certificates of indebtedness hereinabove referred to were identical in form with the invitation, bid and purchase order aforesaid, except as to the date, project numbers, quantities and price and all of said invitations, bids and purchase orders being in the forms prescribed by the laws of Georgia.

After the delivery of said materials, the State Highway Department of Georgia, so long as funds were available for such purposes, paid to petitioner monthly for the materials furnished and delivered during the preceding month. At the time that said State Highway Department of Georgia was indebted to petitioner for such materials in various sums aggregating the principal sum of \$117,050.68, the said

highway department being without funds sufficient to liquidate said indebtedness, thereupon issued to petitioner various certificates of indebtedness aggregating the said principal sum of \$117,050.68, which said certificates of indebtedness were issued in accordance with the provisions of the act of the General Assembly of Georgia approved Feb. 26, 1941 (Ga. Laws 1941, page 596).

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Petitioner amends paragraph 3 of the petition by adding thereto the following:

"On January 1, 1942, and at all times since, each of the partners was and is a resident of Fulton County, Georgia, except W. Corry Smith, who was and is a resident of Hamilton County, Tennessee.

Morgan Belser, Attorney for plaintiff.

[fol. 25] EXHIBIT "A" TO AMENDED PETITION

Contract

This Agreement, made and entered into this 8th day of October, one thousand nine hundred and forty-one, by and between the State Highway Department of Georgia, party of the first part (hereinafter called the State) and E. Jack Smith, Atlanta, Georgia, party of the second part (hereinafter called Contractor), Witnesseth:

Whereas, the State desires the improvement and construction of a certain road hereinafter more particularly described and the contractor desires to furnish and deliver all the material and to do and perform all the work and labor for said purpose:

Now, therefore, in consideration of the promises, the mutual covenants herein contained and the sum of one dollar (\$1.00) by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. The contractor promises and agrees to furnish and deliver all the material and to do and perform all the work and labor required to be furnished and delivered, done and performed in and about the improvement and construction

of 4.535 Miles of paving on the Midway to Dorchester Road. Beginning in Midway and extending toward Dorchester. Otherwise known as Federal Aid Secondary Project No. FAS 2677-B (1) Parts 1 and 2 in Liberty County, in strict and entire conformity with the provisions of this contract, and the notice to contractors and proposals, and the plans and specifications prepared (or approved) by the State Highway Engineer (or his authorized representative), the originals of which are on file in the office of the State Highway Engineer, copies of which are hereto attached, and which said plans and specifications and the notice to contractors and the proposal are hereby made a part of this agreement as fully and so to the same effect as if the same had been set forth at length in the body of this agreement.

2. The State agrees and promises to pay to the contractor for said work, when completed in accordance with the provisions of this contract the price as set forth in the said proposal amounting approximately to fifty-nine thousand, seven hundred forty & 23/100 dollars (\$59,740.23) payments to be made as provided in said specifications upon presentation of the proper certificates of the State Highway Engineer or his representatives and upon the terms set forth in the said specifications and pursuant to the terms of this contract.

3. The said work shall be done in accordance with the laws of the State of Georgia under the direct supervision, and to the entire satisfaction of the State Highway Department, subject at all times to the inspection and approval of the Secretary of Agriculture, or his agents, and in accordance with the rules and regulations made pursuant to that certain Act of the Federal Congress entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes," approved July 11, 1916, and amendments subsequent thereto.

4. The decision of said State Highway Engineer upon any question connected with the execution of this agreement or any failure or delay in the prosecution of the work by the said contractor shall be final and conclusive.

[fol. 26] In Witness Whereof the State Highway Department of Georgia has caused these presents to be executed by Its Chairman Who has been duly authorized thereto by the State Highway Board of Georgia, and E. Jack Smith,

Atlanta, Georgia, the contractor, has hereto set his hand and seal this the day and year above written.

State Highway Board of Georgia. By W. W. Simms,  
Chairman, Executed by State Highway Board this  
the day of Oct. 8, 1941. E. Jack Smith, Contractor.  
By E. Jack Smith,

Witness for the State M. C. B. Holley, Roy A. Flynt.

Witness for the Contractor L. Huline, L. M. Harri-  
son. Approved this day of Oct. 7, 1941. State  
Highway Board of Georgia. M. T. Thadburn,  
State Highway Engineer.

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[fol. 27] EXHIBIT "B" TO AMENDED PETITION

File No. CA 205/3

Contract No. CCA 4641 (W819-eng-838)

Contract  
(Construction)

DEPARTMENT OF COMMERCE  
Civil Aeronautics Administration  
represented by  
United States Engineer Office  
Savannah, Georgia  
(Department)

E. Jack Smith  
Atlanta, Ga.  
(Contractor)

Contract for paving runways, taxiways and aprons at  
Savannah Municipal Airport No. 2. Amount, Approximately  
\$175,140.22. Place Savannah, Georgia.

Payments will be made by the Civil Aeronautics Adminis-  
tration, Accounts Division, Department of Commerce,  
Washington, D. C.

[fol. 28] Contract for Construction.

This Contract, entered into this 16th day of June, 1941,  
by The United States of America, hereinafter called the  
Government, represented by the contracting officer, ex-

cuting this contract, and E. Jack Smith, an individual trad-  
ing as E. Jack Smith, of the city of Atlanta in the State  
of Georgia, hereinafter called the contractor, witnesseth  
that the parties hereto do mutually agree as follows:

Article 1. *Statement of work.*—The contractor shall fur-  
nish the plant, materials, and labor, and perform the work  
for paving runways, taxiways and aprons and installing  
electric service ducts at Savannah Municipal Airport No. 2  
as set forth and described in paragraph 1-02 of the specifi-  
cations for the consideration of an amount to be determined  
from work done and materials, etc., furnished in strict ac-  
cordance with the specifications, schedules, and drawings,  
all of which are made a part hereof and designated as fol-  
lows: Specifications dated Savannah, Georgia, May 19, 1941,  
marked "Invitation No. 819-41-141", consisting of eighty  
(80) paragraphs; Schedule of Prices marked "Insert No.  
1"; and drawings listed in paragraph 1-03 of the specifica-  
tions. The work shall be commenced within ten (10) calendar  
days after the date of receipt by the contractor of notice  
to proceed, and shall be completed within one-hundred and  
twenty (120) calendar days from the date of receipt of said  
notice to proceed as provided in paragraph 1-05 of the speci-  
fications.

[fol. 29] Article 2. *Specifications and drawings.*—The  
contractor shall keep on the work a copy of the drawings  
and specifications and shall at all times give the contracting  
officer access thereto. Anything mentioned in the specifica-  
tions and not shown on the drawings, or shown on the draw-  
ings and not mentioned in the specifications, shall be of like  
effect as if shown or mentioned in both. In case of dif-  
ference between drawings and specifications, the specifica-  
tions shall govern. In any case of discrepancy in the  
figures, drawings, or specifications, the matter shall be im-  
mediately submitted to the contracting officer, without  
whose decision said discrepancy shall not be adjusted by  
the contractor, save only at his own risk and expense. The  
contracting officer shall furnish from time to time such de-  
tail drawings and other information as he may consider  
necessary, unless otherwise provided. Upon completion of  
the contract the work shall be delivered complete and un-  
damaged.

Article 3. *Changes.*—The contracting officer may at any  
time by a written order, and without notice to the sureties,

make changes in the drawings and or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

**Article 6. Inspection.**—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor; and the contractor shall promptly segregate and remove the same from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said article 9 for terminations thereunder.

[fol 30] (b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily in-

volved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employees as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

**Article 8. Superintendence by contractor.**—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

**Article 9. Delays—Damages.**—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to [fol. 31] determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the de-

partment or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. *Eight-hour law—Overtime compensation.*  
*Convict labor.*—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation.

computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*; That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5(b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

[fol. 32] Article 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

[fol. 33] Article 14. *Officials not to benefit.*—No Member of, or Delegate to, Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the

contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

**Article 16. Payments to contractors.**—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed; if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor.

from the operation of the release in stated amounts to be set forth therein.

Article 17. *Rates of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1), this article shall apply if the contract is in excess of \$2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid [fol. 34] as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

*Article 18. Domestic preference.*—In the performance of the work covered by this contract the contractor, subcontractors, material men or supplies, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States insufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, section 10b).

*Article 19. Nonrebate.*—(a) The contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941, 6 F. R. 1211; or any modification thereof pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276b and 276c), sworn to by the contractor or the subcontractor concerned or by the authorized officer or employee of the contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the contractor or such subcontractor from the full weekly wages earned as set out on such pay roll; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly.

from the full weekly wages earned as set out on such pay roll.

(b) The contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(c) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

[fol. 35] Article 20. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 21. *Definitions.*—(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

[fol. 36] Article 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: Article 1, first line, the words "plant," and "and labor" were inserted. Article 11, deleted and revised. Article 11 substituted therefor. Article 19, deleted and revised. Article 19 substituted therefor. Article 23 added. Article 24 added.

Article 23. The amount of one-hundred and sixty-four thousand dollars (\$164,000) has been allotted for work under this contract. The appropriation and allotment of

additional funds is expected. However, if additional funds are not made available, this contract may be terminated upon the expenditure of available funds without liability on the part of the United States by reason of such termination and the reduction in the work made necessary therby shall be as directed by the contracting officer.

Article 24. *Approval.*—This contract shall be subject to the written approval of the Division Engineer, South Atlantic Division, and shall not be binding until so approved.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved Jun. 30, 1941.

The United States of America, by F. W. Altstetter,  
Col., Corps of Engineers, Deputy Contracting Officer,  
Civil Aeronautics Administration; E. Jack  
Smith, Contractor, 756 Hurt Bldg., Atlanta, Ga.  
J. S. Bragdon, Lieut. Col., Corps of Engineers, Division  
Engineer, South Atlantic Division.

Two witnesses: L. Hulme, C. B. Verderf.

[fol. 37] EXHIBIT "C" TO AMENDED PETITION

File No. A. F. 305.1

Contract No. W819-eng-841

Contract  
(Construction)

War Department, United States Engineer Office, Savannah,  
Georgia (Department)

E: Jack Smith, 756 Hurt Building, Atlanta, Georgia  
(Contractor)

Contract for stabilizing Parking Areas at Savannah Air  
Base, Savannah, Georgia. Amount, Approx. \$187,733.00.  
Place Savannah, Georgia.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authorities shown

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below, for Construction of Buildings, Utilities and appurtenances at Military Posts—No Year, the available balance of which is sufficient to cover the cost of same:

Eng.—798 P 99 A.—0540-12

Payments will be made by the Finance Officer, U. S. Engineer Office, Savannah, Georgia.

[fol. 38] **Contract for Construction**

This Contract, entered into this 24th day of June, 1941, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and E. Jack Smith, an individual trading as E. Jack Smith, of the city of Atlanta, in the State of Georgia, hereinafter called the contractor; witnesseth that the parties hereto do mutually agree as follows:

[fol. 39] Article 1. *Statement of work.*—The contractor shall furnish all plant, equipment, labor, and the materials, and perform the work for the construction and completion of soil-cement and bituminous stabilized parking areas; installing storm drainage system, tie-down anchors, and electrical and water services at the Savannah, Georgia, Air Base for the consideration of an amount to be determined from work and materials, etc., furnished in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications marked "Invitation No. 819-41-163" consisting of one hundred two (102) paragraphs; Addenda No. I (in two sheets) and No. II (in one sheet); Schedule of Prices marked "Insert No. 1" page 2(a), hereof; and drawings listed in paragraph 1-03 of the specifications.

The work shall be commenced within five (5) calendar days after receipt by the contractor of notice to proceed and shall be completed within sixty (60) calendar days after receipt of the said notice to proceed.

[fol. 39] Article 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be

of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

*Article 3. Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

*Article 4. Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site, materially differing from those shown on the drawings or indicated in the specifications; or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering

in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

**Article 5. Extras.**—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

**Article 6. Inspection.**—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the corrections of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract; the contractor and surety being liable for any damage to the same extent as provided in said article 9 for terminations thereunder.

[fol. 40] (b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special size, and performance tests shall be as de-

scribed in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

**Article 7. Materials and workmanship.**—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for

his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

*Article 8. Superintendence by contractor.*—The contractor shall give his personal superintendence to the work, or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

*Article 9. Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be [fol. 41] impossible to determine, and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as

set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

**Article 10. Permits and care of work.**—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

**Article 11. Eight-hour law—Overtime compensation.**—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar

day upon such work at the site thereof; except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5(b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

[fol. 42] Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor

shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

[fol. 43] Article 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract. *Provided, however,* That the contracting officer at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full; *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Gov-

ernment, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therin.

*Article 17. Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1); this article shall apply if the contract is in excess of \$2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia):—

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by

such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work governed by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written [fol. 44] notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby;

*Article 18. Domestic preference.*—In the performance of the work covered by this contract the contractor, subcontractors, material men or suppliers shall use only such manufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Statute 1520 (U. S. Code, title 41 section 10b).

*Article 19. Nonrebate.*—(a) The contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Regis-

ter of March 1, 1941, 6 F. R. 1211, or any modification thereof pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276l and 276c), sworn to by the contractor or the subcontractor concerned, or by the authorized officer or employee of the contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the contractor or such subcontractor from the full weekly wages earned as set out on such payroll; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such pay roll.

(b) The contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(c) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

[fol. 45] Article 20. Additional security. Should any surety upon the bond for the performance of this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 21. Definitions.-(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

[fol. 46] Article 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto:

Article 4. The words "all plant, equipment, labor and" inserted.

Article 11. Deleted in its entirety and revised Article 11 substituted therefor.

Article 19. Deleted in its entirety and revised Article 19 substituted therefor.

Article 23. Added.

Article 23. *Approval.*—This contract shall be subject to the written approval of the Division Engineer, South Atlantic Division and shall not be binding until so approved.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved Jul. 12, 1941.

The United States of America, by E. W. Alstaetter,  
Col., Corps of Engineers, District Engineer (Official title); E. Jack Smith, Contractor, 756 Hurt  
Building, Atlanta, Georgia (Business address).

J. S. Bragdon, Col., Corps of Engineers, Division Engineer, South Atlantic Division.

Two witnesses: Robert L. Rivers, M. S. Vines, Notary Public, Georgia, State at Large. My commission expires December 12, 1941.

## [fol. 474] EXHIBIT "D" TO AMENDED PETITION

Atlanta, Georgia,

June 25, 1940.

GENTLEMEN:

Re: Requisition M-864  
Project 1803-A (1)  
Crawford County  
Roberta to Route 3

Sealed bids will be received by the State Purchasing Department, Room 141, State Capitol, Atlanta, Georgia, until 11:00 a. m., Central Daylight Saving Time, July 10, 1940, for furnishing the following material f.o.b. State spreaders on the above project:

Approximately 7,000 tons hot plant sand asphalt seal, section 145, State Highway specifications, with minimum of 20% aggregate retained on 10 mesh sieve.

Quantities are approximate only and may be increased or decreased at the discretion of the supervisor of purchases. The supervisor of purchases reserves the right to reject any or all bids and to waive all formality.

After bids have been received and awards made, purchase orders will be issued for 2500 tons only, as directed by the State Highway Board.

The enclosed affidavit and proposal must be properly executed and returned with bid. Please mark envelope "Sealed bid for Highway Division to be opened July 10, 1940, at 11:00 a. m."

This notice is in accordance with the act of the General Assembly of Georgia, approved March 24, 1939.

Yours very truly, O. C. Glover, Supervisor of Purchases; C. H. Kilpatrick, Asst. Supervisor of Purchases.

CHK:G.

Encl.

## [fol. 48] EXHIBIT "E" TO AMENDED PETITION

## Notice to Bidders

Bidders, please note the following affidavit which is to be executed by each bidder and returned with the enclosed proposal:

Req. M-864, Proj. 1803-A (1),

Crawford County,

Date July 10, 1940.

Robert to Route No. 3.

Proposal

Proposal of E. Jack Smith, contractor, of Atlanta, Georgia, for furnishing the following material (material or equipment):

A. 7,000 tons Hot Plant Sand Asphalt Seal, section No. 145, State Highway specs, with minimum of 20% aggregate retained on 10 mesh sieve \$4.45 per ton to be delivered 15 Crawford County, Georgia, F. O. B. state spreaders on above project.

To State Highway Board of Georgia (Department, Board, Agency, etc.).

Sirs: The following proposal is made on behalf of E. Jack Smith, contractor (names of those interested) and no other. Evidence of my authority to submit the proposal is herewith furnished. The proposal is made without collusion on the part of any person, firm, or corporation.

The following is my itemized proposal: (See attached sheet for itemized proposal).

It is understood and agreed that I have read State Highway Board of Georgia (Department, Agency, Board, Bureau, etc.).

Specifications dated \_\_\_\_\_, and understood that this proposal is made in accordance with the provisions of said specifications, and that said specifications are made a part of this proposal as completely as if the same were attached thereto. It is understood and agreed that this proposal is one of several competitive bids made to this State [fol. 49] Highway Board of Georgia (Department, Board, etc.) and in consideration of the mutual agreements of the bidders, similar hereto, and in consideration of the sum of one dollar cash in hand paid, receipt whereof is hereby acknowledged, the undersigned agrees that this proposal shall

be an option, which is hereby given by the undersigned to the State Highway Board of Georgia (Department, Board, Agency, etc.) to accept or reject this proposal at any time within thirty days from the date on which this sealed proposal is opened and read, and, in consideration of the premises, it is expressly covenanted and agreed that this proposal is not subject to withdrawal by the proposer or bidder, during the terms of said option. There is attached hereto properly executed an affidavit showing that this bidder has no interest, directly or indirectly in any other bid or proposal for said material (material or equipment) and that this bidder will not receive any commission, directly or indirectly, on the sale of said material (material or equipment) in the event some other person, firm or corporation should be declared low bidder for said material (material or equipment).

Witness my hand and seal this the 10th day of July, 1940.

Terms:

Discount:

(Signature) E. Jack Smith, Contractor (L.S.), Address 726 Hurt Bldg., Atlanta, Ga.

Affidavit

STATE OF GEORGIA

County of Fulton:

Before me, an officer of said State, authorized by law to administer oaths personally came E. Jack Smith who on oath says that the attached proposal is submitted independently of any other bid or proposal, and that this bidder has no interest, directly or indirectly, in any other bid or [fol. 50] proposal for said material (material or equipment) and that this bidder will not receive any commission, or any sum whatsoever, directly or indirectly, on the sale of said material (material or equipment) in event some other person, association, firm or corporation should be declared low bidder or awarded the contract or sale of said material (material or equipment).

E. Jack Smith, Affiant.

Sworn to and subscribed before me this the 10th day of July, 1940. M. S. Vines, Notary Public, Georgia, State at Large. My commission expires December 12, 1941.

Notary Public or other officer authorized to administer oaths.

(Here follows 1 photolithograph, side folio 51)



## EXHIBIT F TO AMENDED PETITION

Form HD 45 GO Barfield

PURCHASE ORDER  
FOR VENDOR

Supervisor of Purchases

DATE July 15, 1940

STATE OF GEORGIA

No. 9511 G.O.

Highway Division

ATLANTA

Issued to E. Jack Smith, Contractor, Atlanta, Ga.

For the following items to be shipped to STATE HIGHWAY BOARD OF GEORGIA

Care of D. B. Thompson

Destination

Notify at

Via PREPAID F.O.B. State spreaders or delivery

NOTICE TO VENDOR. Transportation charges must be prepaid on all shipments unless otherwise specified. As soon as shipment is made mail invoice in triplicate showing above order number to State Highway Board of Georgia, Office 110, No. 24 Capitol Square, Atlanta, Georgia. Vendor must furnish delivery receipt with invoice certifying that this order has been filled in accordance with specifications, in compliance with House Bill Number 310, Approved March 24, 1939.

ALL MATERIAL TO MEET STATE HIGHWAY SPECIFICATIONS

ANTITY	DESCRIPTION	UNIT PRICE	TOTAL D.C.	TOTAL NET
Approx				
2500 Tons Hot Plant Sand Asphalt <del>mix</del> , Seal, to meet				
GA. State Highway Specifications, section 145				
with minimum of 20% aggregate retained on 10				
mesh sieve		4.45 ton	11,125.00	

Notice to Vendor: Do not make shipment until instructions are received from the Engineer on the project.

be shipped to STATE HIGHWAY BOARD OF GEORGIA.

Care of D. B. Thompson

Destination

Notify at

Via PREPAID. F.O.B. State spreaders or Delivery

NOTICE TO VENDOR Transportation charges must be prepaid on all shipments unless otherwise specified. As soon as shipment is made mail invoice in triplicate showing above order number to State Highway Board of Georgia, Office 110, No. 2 Capitol Square, Atlanta, Georgia. Vendor must furnish delivery receipt with invoice certifying that this order has been filled in accordance with specifications, in compliance with House Bill Number 310, Approved March 24, 1939.

ALL MATERIAL TO MEET STATE HIGHWAY SPECIFICATIONS

ANTITY	DESCRIPTION	UNIT PRICE	TOTAL	D.C.	TOTAL NET
approx	2500 Tons Hot Plant Sand Asphalt mix, Seal, to meet Ga. State Highway Specifications, section 145 with minimum of 20% aggregate retained on 10 mesh sieve	4.45 ton	11,125.00		

Notice to Vendor: Do not make shipment until instructions and receipted from the Engineer on the project.

Order # 1503-A (1) Roberta to  
ACCOUNT Concrete District  
REQ. NO. 11-364

STATE OF GEORGIA

Supervisor of Purchases

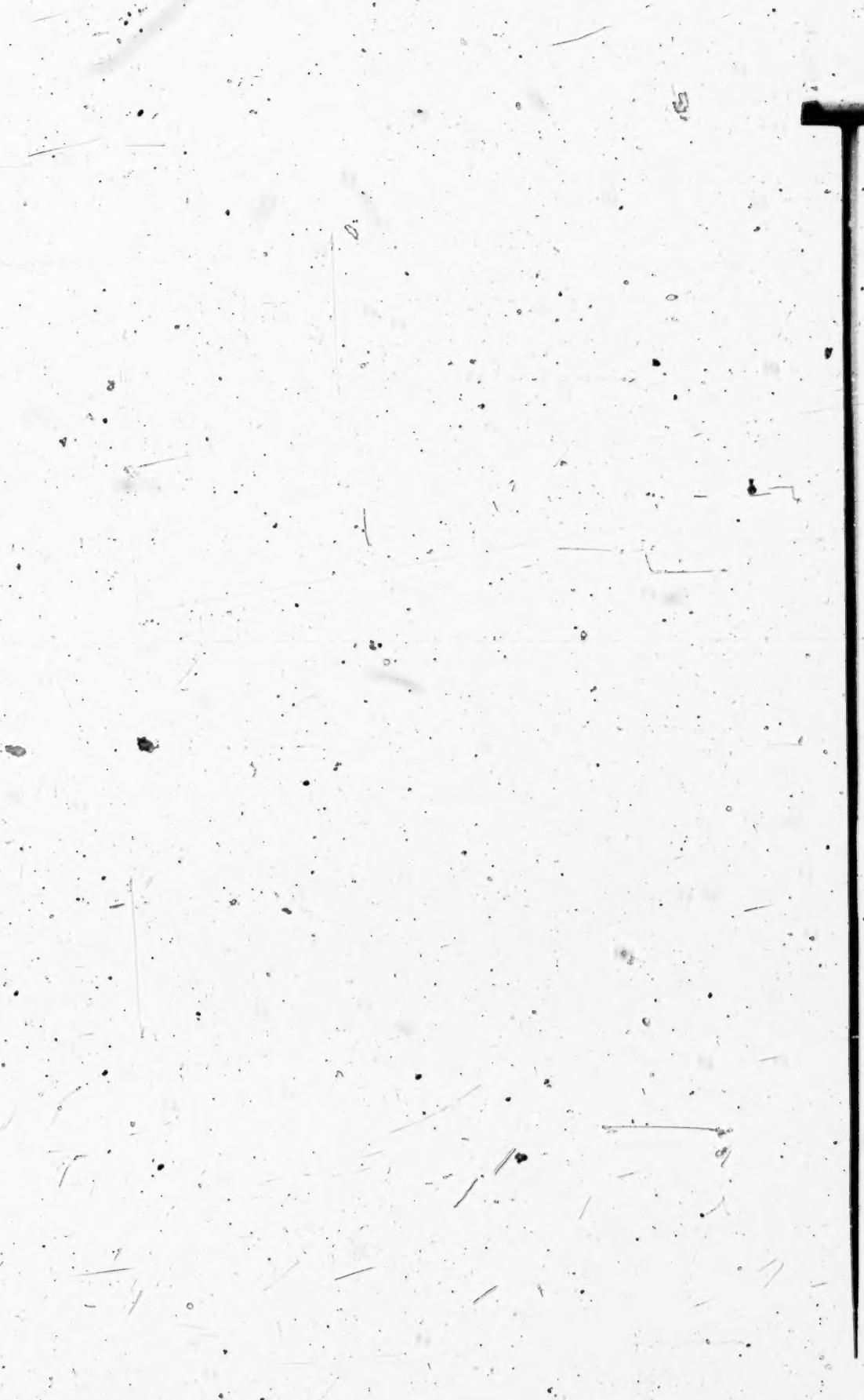
Submit invoice in triplicate showing order number as soon as shipment is made.

TERMS 10 days unless otherwise specified  
hereon

DELIVERY At once unless otherwise specified  
hereon

N° 9511 G.O.

By



[fol. 52] • *Duly sworn to by E. Jack Smith. Jurat omitted in printing.*

IN SUPERIOR COURT OF FULTON COUNTY

ORDER ALLOWING AMENDMENT TO PETITION—March 29, 1943

The within and foregoing petition is hereby allowed and ordered filed subject to objection and demurrer. This March 29, 1943.

Walter C. Hendrix, Judge, Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 53] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AMENDED PETITION—Filed March 29, 1943

Now come Comer Davis, Reese Perry, and John C. Townley, in their capacity as members of the Board of Tax Assessors of Fulton County, Georgia, Guy Moore in his official capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his official capacity as tax collector of Fulton County, Georgia, and each at the same term of court after the filing and allowance of an amendment to plaintiff's petition, respectfully renew their original demurrer which was filed on March 29, 1943, to the plaintiff's petition, as amended, upon all the general grounds thereof, and respectfully urge grounds 1st, 2nd, 3rd, 8th, and 9th of their original demurrer to the plaintiff's petition as amended and ask that plaintiff's petition as amended be dismissed for all of the reasons set forth in said grounds of the general demurrer heretofore filed.

Defendants also demur to the petition as amended on the following grounds:

10th

Because it appears from the petition that each species of property owned by petitioner and described in the peti-

tion was taxable property, subject to ad valorem tax in Fulton County, Georgia, for the year 1942, and property which the constitution and laws of Georgia requires to be taxed to petitioner?

11th

Defendants demur separately to those portions of the petition relating to accounts due petitioner by Camden County, the State of Georgia and the United States Government [fol. 54] and to those portions of the petition relating to certificates of indebtedness issued to petitioner by the Highway Department of the State of Georgia, and separately to all portions of the petition relating respectively to indebtedness owing to petitioner by Camden County and by the State of Georgia and by the United States Government, upon each of the following grounds:

(a) Because said portions of the petition set forth no cause of action nor part of a cause of action against the defendants or either of them.

(b) Because it affirmatively appears from the petition that the respective accounts and the certificates of indebtedness described respectively in paragraphs 5 and 6 of the petition as amended and in paragraphs 7, 8, 9, and 10 of the petition as amended are each taxable property, owned on January 1, 1942, by the petitioner and as such subject to tax in Fulton County, Georgia.

12th

Because there is no equity in the bill as amended.

13th

Because the petition as amended sets forth no cause of action against the defendants or either of them and sets forth no facts entitling petitioner to any of the relief prayed.

Wherefore, defendants pray that this demurrer and the original demurrer be each sustained upon each and every ground thereof, and that plaintiff's petition be dismissed.

E. H. Sheats, W. S. Northcutt, Standish Thompson,  
Attorneys for Defendants.

[File endorsement omitted.]

[fol. 55] In SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

SECOND AMENDMENT TO PETITION.—Filed April 20, 1943

Comes now E. Jack Smith, contractor; a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, and by leave of the court first had and obtained, amends the petition heretofore filed in said case as follows:

1

Petitioner amends paragraph 12 of the original petition by adding thereto the following to be known as paragraph 12-A:

12-A. Petitioner shows that in pursuance of the notice and threat aforesaid, the said Board of County Tax Assessor's of Fulton County, Georgia, did on Saturday, November 21, 1942, actually assess said accounts receivable and certificates of indebtedness against petitioner; that petitioner did not learn of said assessment until the following Monday, November 23rd, 1942, on which day, at petitioner's instance, petitioner's attorney prepared a petition and proposed order thereon for the purpose of contesting the taxability of said items, as well as for the purpose of enjoining the assessment and collection of taxes thereon; that said petition was not completed until late in the afternoon of November 23, 1942, at which time it was learned that the judge had left the court house. Petitioner's said attorney therefore went to the court house early on the morning of November 24, 1942, for the purpose of obtaining an order on said petition from the judge, who, under the rules of court, was authorized to sign the same; [fol. 56] that when he arrived at the office of such judge he learned that the judge had not arrived; that pending the arrival of the judge, petitioner's attorney then went to the office of the board of county tax assessors of said Fulton County, and requested Mr. Comer Davis, a member of the board, not to have the assessment entered on the Digest until petitioner's attorney was able to present the petition and order aforesaid to the judge for his signature; that he was advised by the said Comer Davis that the original assessment already had been sent to the office of Mr. Guy Moore, the tax receiver of said County.

torney immediately went to the tax receiver's office and requested that the tax receiver not enter the said assessment upon the digest until said attorney had had an opportunity to present the petition to the judge; that he was advised by the tax receiver that the particular assessment, along with many others already had been delivered to one of the clerks in his office charged with the duty of making the actual entries on the digest. Thereupon petitioner's said attorney, accompanied by the tax receiver, went to the office where said clerk made the entries aforesaid and found the clerk actually marking entries on the digest; that an examination disclosed that the particular assessment against petitioner in this case would be reached in alphabetical order within one hour and that it would be impossible for the tax receiver or the said clerk to withhold the entering of said assessment on the digest. Upon learning this, petitioner's said attorney went back to the chambers of the judge and obtained an order temporarily restraining and enjoining the assessment and entering of the same upon the digest and after filing and having the same docketed, he immediately served copies thereof on all of the defendants, including the tax receiver while the tax receiver, through his clerk aforesaid, was actually in the process of making entries on the digest and only a few minutes [tot. 56] before the particular assessment involved in this case would have been so entered.

Morgan Belser, Attorney for Plaintiff.

*Duly sworn to by R. L. Rivers. Jurgt omitted in printing.*

IN SUPERIOR COURT OF FULTON COUNTY.

~~Order allowing Second Amendment to Petition—April~~  
20, 1943

The within and foregoing petition is hereby allowed and ordered filed subject to objection and demurrer.

This April 20, 1943.

Walter G. Hendrix, Judge Superior Court, Atlanta  
Circuit.

[File endorsement omitted.]

[fol. 58] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

RENEWAL OF DEMURRER—Filed May 11, 1943

Now come defendants and respectfully renew their demurrer filed in this case on Jan. 16, 1943, and on March 29, 1943, which demurrer is renewed to the petition as amended by amendments filed March 29, 1943, and April 20, 1943.

Said demurrer is renewed upon and each and every ground thereof to the plaintiff's petition as amended.

Wherefore defendants pray that their demurrers heretofore filed be sustained and that plaintiff's petition as amended be dismissed.

E. H. Sheats, W. S. Northcutt, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 59] IN SUPERIOR COURT OF FULTON COUNTY

E. JACK SMITH et al.

vs.

T. E. SUTTLES et al.

ORDER OVERRULING DEMURRERS—May 14, 1943

GEORGIA,

Fulton County:

In the above entitled cause the defendants filed a demurrer to the plaintiff's petition. This demurrer was filed on the 15th day of January, 1943.

Thereafter, on the 29th day of March, 1943, the plaintiffs filed an amendment. On the same date the defendants filed a renewal of their original demurrer to the petition as thus amended and urged all of the general grounds of the said demurrer which had been theretofore filed to the petition as amended and urged grounds 1, 2, 3, 8 and 9 of their demurrer to the plaintiff's petition as amended and asked that the plaintiff's petition as amended be dismissed as set

forth in all of the general grounds of the demurrer heretofore filed. Said demurrer also urged additional grounds, namely, grounds 10, 11, 12 and 13 to the petition as amended.

Thereafter, on the 20th day of April, 1943, the plaintiffs filed an additional amendment and subsequently thereto the defendants filed a renewed demurrer to the petition as amended or as twice amended.

All of these demurrers coming on for a hearing and after hearing argument it is considered, ordered and adjudged by the court as follows: That all of the general demurrers be and the same are hereby overruled.

It is further considered, ordered and adjudged by the court that grounds 1, 2, and 3 of the demurrer filed by [fol. 60] the defendants on January 15, 1943, be and the same are hereby overruled.

It is further considered, ordered and adjudged by the court that in view of the amendments that grounds 4, 5, 6, and 7 of the demurrer filed January 15, 1943, be and same are hereby overruled.

It is further considered, ordered, and adjudged that grounds 8 and 9 of the demurrer filed on January 15, 1943, be and the same are hereby overruled.

It is further considered, ordered, and adjudged that the demurrer filed by the defendants on the 29th day of March, 1943, be and the same is hereby overruled on each and every ground thereof.

It is further considered, ordered, and adjudged by the court that the renewed demurrer to the plaintiffs' petition as amended (filed on May 11, 1943) be and the same is hereby overruled.

This 44th day of May, 1943,

Walter C. Hendrix, Judge, S. C. A. C.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] IN THE SUPREME COURT OF GEORGIA

DAVIS et al.

vs.

SMITH et al.

OPINION November 11, 1943

By the Court:

Non-interest-bearing certificates of indebtedness issued by the State Highway Board of Georgia under the provisions of the act approved February 26, 1941 (Georgia Laws 1941, p. 596), and accounts receivable (1) for paving, due by a county in this State, and (2) a like unpaid balance due by the United States Government for work done and labor and materials furnished in the erection of airports for the United States Army, and held by the citizens of this State, are taxable as property, and are not exempt therefrom as falling within what is known as the instrumentalities rule.

A contractor partnership composed of E. Jack Smith, Jack Clark, and R. L. Rivers, residents of Fulton County, Georgia, and W. Corry Smith, a resident of Tennessee, filed a petition against Comer Davis, Reese Perry, and John C. Townley in their capacity as the board of county tax-assessors of Fulton County, and against Guy Moore as tax-receiver, and T. E. Suttles as tax collector of said county, and sought to enjoin the defendant tax officials from making any assessment against the plaintiff partnership by reason of its ownership of accounts receivable and of certificates of indebtedness described in the petition, for the calendar year 1942; and sought to enjoin the defendants from entering said assessments or from issuing executions based thereon, or from doing anything to force Smith, the contractor, to pay taxes on such accounts receivable and [fol. 63] certificates of indebtedness. In the petition it was alleged as follows: Petitioner is in the contracting and construction business, and furnished paving materials to and performed certain work in constructing public highways and United States air bases for the State of Georgia, various counties of Georgia, and the United States Government. On January 1, 1942, petitioner held and owned the following accounts due to it by the County of Camden, \$1102.14.

the State of Georgia, \$15,086.84, and the United States Government, \$29,831.10. It held and owned certificates of indebtedness amounting to \$147,050, issued to it by the Highway Department of Georgia, in accordance with the act of the General Assembly approved February 26, 1941 (Georgia Laws 1941, p. 596). The indebtedness owing by Camden County represented an open account for furnishing and laying paving materials on a public highway in that county, commenced and completed within the year 1941, and performed under contract with Camden County. This contract was not in writing, but was orally entered into on or about July 10, 1941, between petitioner and the Board of Commissioners of Camden County, under the terms of which it was agreed that petitioner would construct a public highway in the county, furnishing specified labor and materials, and that Camden County would pay a stated sum therefor. Although said work was done and said materials furnished before January 1, 1942, payment to petitioner was not made until afterward. Accordingly this item of \$1,102.14 represented an open account receivable due to petitioner on January 1, 1942. The indebtedness of the State represented an open account due for grading, draining, paving, furnishing paving materials, and constructing public highways in Liberty and Camden Counties, which work was commenced and completed within the year 1941, and was performed in accordance with the terms of a contract executed on October 8, 1941, between petitioner and the State Highway Board, a copy of said contract being attached to the petition. The indebtedness of the United States Government represented an open account due for such work and materials used in constructing United States Army Airports at Savannah, which work was performed under contract with the U. S. Government, the amount of this indebtedness due on January 1, 1942, being \$29,831.10, the unpaid balance owed to petitioner on January 1, 1942.

Petitioner Alleged, that the certificates of indebtedness referred to evidenced an indebtedness in said amount due to petitioner by the State of Georgia for work done and performed under contract with the State; that the State Highway Department contracted for such materials by inviting bids from contractors engaged in furnishing such materials, and by awarding contracts to those making the lowest bid; that petitioner was the lowest bidder; that after

the delivery of said materials, the State Highway Department so long as funds were available for such purposes, paid to petitioner monthly for the materials furnished and delivered during the preceding month; that at the time the State Highway Department was indebted to petitioner for such materials in various sums aggregating the principal sum of \$117,050.68, the said Highway Department being without funds sufficient to liquidate said indebtedness, thereupon issued to petitioner certificates of indebtedness aggregating said sum, which certificates were issued in accordance with the act of the General Assembly of Georgia, approved February 26, 1941 (Ga. L. 1941, p. 596). Petitioner alleged that said accounts receivable and said certificates of indebtedness are not subject to taxation in Fulton County or the State of Georgia; that the threatened taxation of them would deprive petitioner of his constitutional rights guaranteed to him by the State constitution, art. 1, sec. 1, par. 3 and by the fourteenth amendment to the U. S. Constitution; that it would seriously affect the salability of all of petitioner's property, and would greatly annoy petitioner, because said property is actually being used by [fol. 65] petitioner in constructing runways and other pavement on United States Army airports.

The defendants demurred to the petition, on the grounds: that no cause of action is set forth; that the petition shows no equity; that it fails to disclose any reason why the accounts receivable and certificates of indebtedness are not subject to tax in Fulton County; that the allegations relating to the unconstitutionality of the threatened assessment and taxation of petitioner's accounts are without merit; for the reason that petitioner shows no legal reason why such assessment and such taxation would deprive it of its property without due process of law; that the allegations seek only an alleged constitutional right by reference only to a clause of the constitution, without setting forth the reason of the basis of said attack, or any facts which disclose lack of due process in the conduct of the defendants; that it appears from the petition that each species of the described property owned by petitioner is property subject to ad valorem tax in Fulton County for the year 1942, and property which the constitution and laws of Georgia require to be taxed. The defendants demurred specially to those portions of the petition relating to accounts due petitioner by Camden County, the State of Georgia, and the

United States Government, and those relating to certificates of indebtedness issued to petitioner by the State Highway Department; and to all portions of the petition relating respectively to indebtedness owing to petitioner by Camden County and by the State of Georgia and by the United States Government, upon the grounds: (a) that said portions of the petition set forth no cause of action, and (b) it affirmatively appears that the respective accounts and the certificates of indebtedness are taxable property, owned on January 1, 1942, by petitioner, and as such subject to tax in Fulton County.

The demurrer was overruled, and the defendants excepted.

[fol. 66]. GRICE, Justice:

Taxation is the rule, and exemption the exception. Athens City Water Works Co. v. Athens, 74 Ga. 413; Pacific Co. v. Johnson, 285 U.S. 480, 491. What is here sought to be taxed are accounts receivable, due by the government of the United States in the one instance, and Camden County in the other, and a certificate of indebtedness issued by the State Highway Board of Georgia by virtue of the act approved February 26, 1941 (Ga. L. 1941, p. 596). Section 5A of that act provides in express terms that, "No acknowledgement, evidence of debt, or chose in action issued by virtue of this act shall bear any interest for the past or future." The indebtedness of the United States government represents an amount due by it for certain work and material used in constructing United States Army airports at Savannah, the account representing an unpaid balance. That due by Camden County represents an open account for services and paying material on a public highway in that county. The certificate of indebtedness issued by the State Highway Board represents money due to the defendant in error by the State highway authorities for work done and materials furnished in the building of roads. Defendant in error was a contractor doing work on several projects out of which these debits grow. It is and was not an officer of the government, the State or the county. Ordinarily bills receivable and accounts receivable are personal property and subject to be taxed. Code, §§ 92-102, 92-6215. None of the several species of property in question has been specifically ex-

empted by the constitution of this State nor the statutes passed in conformity therewith. If any of it be exempt, it must be because it falls within what is known as the instrumentalities rule. The first time that rule was mentioned in the decisions of this court was in Ponick v. Foster, 129 Ga. 217 (58 S. E. 773, 12 L.R.A. (N.S.) 1159, 12 Ann. Cases 346), where it was ruled that neither the bonds [fol. 67] of the State nor of any of its political subdivisions were subject to be taxed; the precise question being whether bonds issued by a municipality and in the hands of a citizen and resident of this State were taxable by the State and the county. The decision in that case was based on the proposition, that, credit being indispensable to any government, it is necessary to establish the same in order to carry on successfully governmental functions, and that one of the most usual methods of using such credit is by the issue of securities and placing them in the markets of the world for sale. The further argument was that every such loan is made in the exercise of a governmental power and to effectuate a governmental object; and, that when a negotiable instrument is issued in order to raise money to effectuate a governmental purpose, the paper issued by it is an instrumentality of government. We have nothing of the kind here. Other courts and textwriters, in dealing with the instrumentalities rule, call attention to the fact that if a tax were placed upon these instrumentalities issued by the government, and bearing interest, it would lessen their worth on the market, and to that extent place a burden upon and hamper the government in the exercise of its functions to borrow money, and cause the securities so issued by the government to bring less on the market. See authorities there cited, and others hereinafter mentioned.

None of those considerations are operative in the instant case. It was ruled in City of LaGrange v. Whitley, 180 Ga. 805, that a contractor was not exempt from an ordinance imposing an occupation tax because the business conducted by him was that of doing paving under contract with public bodies and that such status did not give him the position of an agency of government. In James v. Dravo Contracting Co., 302 U. S. 134, it was ruled: "An independent contractor, engaged under his contract with the Government in the construction of locks and dams for the improvement of navigation, is not an instrumentality

[fol. 68] of the Government." In *Penn Dairies v. Milk Control Commission*, — U. S. — (63 Sup. Ct. 617, L. ed.), it was said that "those who contract to furnish supplies or render services to the Government are not such agencies and do not perform governmental functions. \* \* \* The trend of our decisions is not to extend governmental immunity from State taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the ~~constitution~~ presupposes the continued existence of the States functioning in co-ordination with the national government, with authority in the States to lay taxes and to regulate their internal affairs and policy; and that State regulation like State taxation inevitably imposes burdens on the national government of the same kind as those imposed on citizens of the United States within the State's borders." Citing *Metcalf v. Mitchell*, 269 U. S. 523, 524 (46 Sup. Ct. 174, 70 L. ed. 384).

The cases of *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522 (36 Sup. Ct. 453, 60 L. ed. 779), and *Gillespie v. Oklahoma*, 257 U. S. 501-506 (42 Sup. Ct. 171, 66 L. ed. 338), may be distinguished. In the first of these two it was held: "Oil leases of land in Oklahoma made by the Osage tribe of Indians under authority of the acts of February 28, 1891, and March 3, 1905, are under the protection of the Federal Government, and the lessee is a Federal instrumentality, and the State can not, therefore, tax its interest in the leases either directly, or as the leases are represented by the capital stock of the corporation owning them." In the *Gillespie* case: "The net income derived by a lessor from sales of his share of oil and gas received under leases of restricted Creek and Osage lands, which constitute him in effect an instrumentality used by the United States in fulfilling its duties to the Indians, can not be taxed by a State." The basis of these two decisions rests on the peculiar relationship that the Government of the United States bears to the Indian tribes, which have [fol. 69] frequently been referred to as the wards of the nation, they being directly under the protection of the Federal Government. Nothing in *McCulloch v. Maryland*, 4 Wheat. 316, *Weston v. Charleston*, 2 Pet. 449, *Pittman v. Home Owners Loan Cor.*, 308 U. S. 21, *Banks v. Mayor*, 7 Wall. 16, or *Federal Land Bank of New Orleans v. Cros*.

land, 261 U. S. 374, is in conflict with the position of the plaintiffs in error that these credits are taxable. The case of People ex rel. Astoria Light &c. Co. v. Cantor, 236 N. Y. 417 (141 N. E. 901), has been examined; and we are unable to follow the reasoning therein, or the conclusion reached. It was held: "An unpaid balance of a debt owing on account from the United States on a fully performed war contract is not taxable under Greater New York Charter and Tax Law, § 12, as taxation by the State would hinder the exercise of the Federal Government's constitutional powers to borrow money on the credit of the United States, to declare war, and to raise and support armies." The reasoning of the New York court does not satisfy us. The only authorities cited in support of that ruling are McCulloch v. Maryland, and Banks v. Mayor, *supra*. Neither of them, in our opinion, supports the decision. It is true that between the New York case and the instant case is this difference, to wit: in that case the contractor was to receive an amount equivalent to the actual cost plus a reasonable amount for certain overhead charges. We can not perceive, however, that this makes any difference in principle. Let it not be thought that we are of the opinion that a tax, not on the property of the sovereign, which adds to it only an incidental *burden* to the government, is for that reason illegal, nor would it be so even if it also carries a *hindrance* or *embarrassment* to the government which was only incidental. See Wheeler Lumber Co. v. United States, 281 U. S. 572; Liggett & Myers Co. v. United States, 299 U. S. 383; [fol. 70] Alward v. Johnson, 282 U. S. 509; and particularly Railroad Co. v. Peniston, 18 Wall. 5, where it was said: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-

coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited."

We apprehend that if the defendant in error had failed to pay his ad valorem taxes on the machinery it used in executing the contracts out of which these debts grew, a tax execution would have been issued and levied thereon. This might have tended incidentally to embarrass the government; for it probably would have withdrawn from use an implement in use by the contractor on a government project. Could it be successfully claimed that the State was impotent [fol. 71] to enforce its claim for taxes against the property merely because of the use to which its owner had put it? We think not, in view of the controlling authorities. Our conclusion is that the taxation of an account receivable, due from the government of the United States, would not so hinder and embarrass the government in carrying out the powers conferred by the constitution as to forbid the State and its political subdivisions from the exercise of the power to tax the same as property in the hands of the contractor. Nor is the same exempt for any other reason. In our opinion the same thing would apply to the two other credits here involved, one due by the State Highway Board, and the other by Camden County.

For a valuable annotation on the general principles involved in Penick v. Foster, *supra*, see 26 A. L. R. 547, continued in 44 A. L. R. 510.

Whether bills receivable and accounts receivable owed by the United States, the State, or a county have seldom or never before been taxed in Georgia, does not answer the question here involved. A like suggestion, however, seems to have been considered by this court in *Georgia Railroad*

& Banking Company v. Wright, 124 Ga. 596 (reversed on other grounds, 207 U. S. 127), where it was held that shares of stock in one corporation, owned by another, were taxable in the hands of the latter. It was said: "It cannot avail the railroad company that during all the years for which the tax now under consideration was levied it had issued annual statements showing its possession of the shares of stock now sought to be taxed, and that the comptroller-general might have ascertained from these statements, which were easily accessible to him, the Georgia Railroad's ownership of the shares. 'Estoppels against the State are not favored; and although they may arise from its express grants, they can not arise from the laches of its officers, since persons who deal with an officer of the government are bound to know the extent of his power and [fol. 72] authority.' Lott v. Brewer, 64 Ala. 287."

One other argument was suggested; rather than urged, and it was that it would not be in keeping with the honor and good faith of the State or any of its subdivisions to tax these debts. Courts can not decide cases according to their views as to what should be the public policy of the State. Judges are not made the keepers of the State's conscience. If it be the law that these items are taxable, we must so declare.

Judgment reversed. All the Justices concur, except.

JENKINS, Presiding Justice, dissenting:

While in Penick v. Foster, 129 Ga. 217 (supra), the question was the power to tax municipal bonds, there designated as "instrumentalities of the government which creates the municipal corporation," the immunity declared seems not to have been based upon the fact that bonds were such an instrumentality, but rather upon the fact that such an instrumentality evidenced a government obligation, and that this immunity "is necessary in order that the functions of government be not unduly impeded." While the rule announced in the Penick case has by no means been universally adopted, it has been recognized in California, Louisiana, Michigan, Nebraska, South Carolina, South Dakota, and Tennessee. See especially Droll v. Furnas County, 108 Neb. 85 (187 N. W. 876, 26 A. L. R. 543), holding that warrants issued by a subdivision of the State are government instrumentalities, and as such are nontaxable.

Stratis v. Anderson, 254 Mass. 536 (159 N. E. 822, 44 A. L. R. 510).

These rulings are not based upon any constitutional or statutory provision, but are grounded on the principle that the power to tax is the power to destroy, and that any levy of tax on a government obligation tends to impair the credit of the sovereign, and to impede the execution of its authorized functions. As I understand it, the word "instrumentality" has no special, narrow significance, the [fol. 73] fundamental basis of all of the above decisions being that the obligation is that of the sovereign government or of a subordinate branch thereof. The reasoning employed in the Penick case, that if bonds were permitted to be taxed, the governmental authority issuing them could not sell them nearly so advantageously, would apply with equal or greater force in the making of contracts, if bidders are to be subjected to taxation on the sovereign's certificates of indebtedness.

The conclusion reached in this dissent is based, not only on the rule recognized by the court of last resort in the State of New York, in People ex rel. Astoria Light Co., 141 N. E. 901, dealt with but disapproved in the majority opinion, but as I see it is the necessary sequence of what was said by the Supreme Court of the United States, through its Chief Justice, in Banks v. Mayor, 74 U. S. (7 Wall.) 16, 21, 23, where the court, dealing with certificates of indebtedness, seems to have planted its holding squarely upon the fact that an authorized debt of the sovereign is not taxable; and that such certificates, even for indebtedness already incurred, stand upon precisely the same footing as bonds issued for the purpose of obtaining funds to be thereafter expended. In that decision the court used the following language: "Evidences of indebtedness of the United States . . . sometimes called stock or stocks, but recently better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under State legislation. . . . No one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States. . . . An attempt was made . . . to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious but failed to convince us that such a dis-

tinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction [fol. 74] of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money. \* \* \* The certificates of indebtedness \* \* \* were received instead of money at a time when full money payment for supplies was impossible, and \* \* \* are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued."

In Hibernia Savings Society v. San Francisco, 200 U. S. 310, 313, 314, the ruling just quoted was cited with approval, and the rule that certificates for past expenditures stand on the same footing as bonds seems to have been fully recognized, although the court held that mere warrants issued for "immediate" payment, being no more than checks or money, did not come within the rule.

The effect of the majority ruling would seem to be far-reaching. So far as I am aware, it will for the first time subject to taxation in this State a vast number of governmental obligations issued or owing by the various governmental agencies. It appears to me that if bonds issued by the State or one of its subordinate divisions, for the purpose of borrowing money, are non-taxable, *a fortiori* should an obligation, issued by any one of the authorized governmental agencies, where payment is in default, be non-taxable; since the impairment of credit or other impeding of governmental functions may be even greater than that resulting from the taxing of bonds. The results of the majority holding, both on the State or its subordinate divisions or governmental agencies, and affecting large groups [fol. 75] of persons to whom it may be necessary in times of financial stress to issue certificates, scrip, or other obligations in lieu of cash, may be so injurious as to seriously and literally impede the functions of government.

[fol. 76]

## IN SUPREME COURT OF GEORGIA

JUDGMENT—November 11, 1943

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

COMER DAVIS, Tax Assessor, et al.

v.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. All the Justices concur, except Jenkins, P. J., who dissents.

[fol. 77]

## IN SUPREME COURT OF GEORGIA

[Title omitted]

MOTION TO MODIFY JUDGMENT—Filed November 22, 1943

To the Honorable Supreme Court of Georgia:

This case came before the Supreme Court of Georgia by writ of error from the superior court of Fulton county; and the judgment of the trial court overruling the defendants' general demurrer to the petition was reversed by the Supreme Court on November 11, 1943.

Come now the defendants in error and respectfully pray that the Honorable Supreme Court modify the judgment and opinion rendered therein on November 11, 1943, by directing that the trial court, at the time the judgment of this court is made the judgment of the trial court, enter an order sustaining the defendants' general demurrer and dismissing the plaintiffs' petition, in order that the judgment of the Supreme Court may thus be made final within the Rules of the Supreme Court of the United States and the Federal Statutes requiring a final judgment as a prerequisite to jurisdiction to review the judgment of the Supreme Court of Georgia, it being the bona fide intention of

the defendants in error to carry this case to the Supreme Court of the United States within the time allowed by law.

Respectfully submitted, Morgan Belser, Attorney for the Defendants in Error.

I hereby certify that I have served a true copy of this motion on W. S. Northeutt, Esq., counsel for the plaintiffs in error, by mailing it to him with the proper postage affixed.

Morgan Belser, Attorney for Defendants in Error.

[File endorsement omitted.]

[fol. 78] SUPREME COURT OF GEORGIA

ORDER MODIFYING JUDGMENT—Dec. 2, 1943

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

On motion of counsel for the defendants in error it is ordered that the judgment rendered in this case on November 11, 1943, be hereby amended so that it shall now read as follows:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. It is further ordered and adjudged that the trial court, at the time the remittitur of this court is made the judgment of that court, shall enter an order sustaining the demurrer and dismissing the petition. All the Justices concur except Jenkins;

[fol. 79]

## SUPREME COURT OF GEORGIA

MODIFIED JUDGMENT—November 11, 1943

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. It is further ordered and adjudged that the trial court, at the time the remittitur of this court is made the judgment of that court, shall enter an order sustaining the demurrer and dismissing the petition. All the Justices concur except Jenkins, P. J., who dissents.

[fol. 80]

## IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER STAYING TRANSMITTAL OF REMITTITUR—Filed Dec. 2,  
1943

On motion of counsel for the defendants in error it is ordered that the transmittal of the remittitur of this court, as amended this day, be stayed for thirty (30) days.

R. C. Bell, Chief Justice, Supreme Court of Georgia.

This second day of December, 1943.

[File endorsement omitted.]

## [fol. 81] IN THE SUPREME COURT OF GEORGIA

{Title omitted]

ORDER FURTHER STAYING TRANSMITTAL OF REMITTITUR  
Dec. 30, 1943

On motion of counsel for the defendants in error, It Is  
Ordered that the transmittal of the remittitur of this Court  
be stayed until February 2, 1944.

This the 29 day of December, 1943.

R. C. Bell, Chief Justice, Supreme Court of Georgia.

{File endorsement omitted.]

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

## [fol. 83] SUPREME COURT OF THE UNITED STATES

## ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.